IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6809

DENNIS SEAY JENKINS,

Petitioner,

v.

CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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STATEMENT OF QUESTION INVOLVED

Whether consistent with the Fifth Amendment to the United States Constitution a defendant in a state criminal prosecution can be cross-examined concerning his failure to go to the police at a time before his arrest and give the same explanation of self-defense which he gave in testimony on trial.

Petitioner would answer 'no'.

STATEMENT OF THE CASE

This is a criminal case originating in the Recorder's Court for the City of Detroit in the State of Michigan in 1974.

Petitioner was charged in a one count Information with the commission of the offense of murder of the first degree in the stabbing death of one Doyle Redding (T79).*

The case was tried to a jury (T75).

Ronald Conner testified (T82ff) that on August 13, 1974 in the afternoon, he and the deceased (T82) were in an apartment at 7845 East Forest in the City of Detroit (T84) when the deceased left to go across the street to the Big D's Party Store (T84). After the deceased entered into the store, petitioner passed by the store and then came back toward the store and as the deceased stepped out of the store, petitioner stabbed deceased in the chest (T85). Deceased had no weapon and he had made no gesture toward petitioner (T86). After he was stabbed, the deceased threw a bottle at petitioner who had run away (T86). The deceased came back to the apartment and when the witness opened the door, the deceased fell and the witness 'drug' him into the apartment (T87). The deceased had a pocket knife in his hand; it was the same knife that petitoner had stabbed him with; the deceased had pulled the knife out of himself (T88). The witness identified Exh #1 as the pocket knife (T89). On cross examination, the witness testified that on August 12, petitioner was in the company of a 'guy' and two girls and that

*The T in the parentheses refers to the Transcript of testimony adduced on trial of this case in the state court; the numbers, to the pages within.

The 'a' in the parentheses refers to the Appendix; the numbers, to the pages within.

the witness and the deceased had robbed the 'guy' of $23 and some dope (T104). Petitioner was a half block away when the robbery took place (T112).

Bonnitta Hicks testified (T114ff) that it was her apartment from which the deceased left to go to the party store (T115), but that she was not looking out of the window and saw nothing (T116). She saw the deceased when he came back to the apartment; he had a knife in his hand and he was bleeding from the chest and he said 'I have been stabbed' (T118). The night before, petitioner and a guy and two girls were trying to sell some narcotics (T119). There was an objection and it was sustained (T119).

Sawait Kanluen, a forensic pathologist (T127), testified that he had performed an autopsy on the body of the deceased (T129). He found a stab wound to the heart (T130); he opined that cause of death was a stab wound to the heart causing massive bleeding (T132). The deceased had needle marks on both arms indicating that he had been a narcotics user (T132).

Robert Gaines testified (T153ff) that on August 13, 1974 he was employed in the Big D Party Store (T153). Shortly before 2:00 pm, the witness waited (T172) on a guy named 'Slim' (T173) and while doing this, the witness saw petitioner in the doorway of the store (T173-174). 'Slim' was the deceased (T174). Petitioner had first walked by the store and then he stood by the door (T175); petitioner stood and smiled (T175). When the deceased walked out of the door, petitioner 'come from behind his back' and 'plunged' at the deceased. Deceased had no weapon; he had a bag in his hand (T176). Deceased staggered back, pulled the knife out and went toward petitioner (T176). Petitioner ran (T177), and the deceased headed across the street with the knife in his hand (T177).

Willie Brunner testified (T213) that on August 12, while in the company of petitioner's sister, he was robbed by a person unknown to him of money, no narcotics.

The prosecution rested (T225).

Omar Wright testified (T227ff) that at the time in question, he was passing by the party store and he saw two men in the doorway of the store arguing; he didn't know either man; one of the men was petitioner (T229). There was a struggle; petitioner pushed the other man and started running; and the other man chased petitioner (T230). The witness didn't see a knife in anybody's hand prior to the chase (T232); while running, the other man had a knife in his hand (T231).

Fontaine Berrien testified (T244ff) that at the time and place in question, he saw two men tussling; one, the petitioner, broke and ran and the deceased chased him (T245). He saw a knife in the hands of the deceased for the first time when the deceased was chasing petitioner (T249).

Ronald Lewis testified (T254ff) that he was a PhD in psychology and that according to tests he performed on petitioner, petitioner was a left-handed person and that if he stabbed anybody, he probably would have used the left hand (T261).

Adolphus Cunningham testified (T266ff) that at the time and place in question, he was in the company of Fontaine Berrien (T266) and that he saw petitioner and another struggling at the party store and that he saw petitioner break away and run and the deceased chase him (T267).

Petitioner testified (a24ff) that he was 23 years old and single (a24). On August 12, his friend was robbed on the street and petitioner stopped the police and made a report (a25). The next day as petitioner was passing the party store, he ran into deceased who accused petitioner of following him

and of being the person who reported to the police (a27). Deceased told petitioner that petitioner was thinking about sending the police around and then the deceased came at petitioner with a knife (a27). Petitioner caught deceased's hand and tried to throw him through the window; petitioner pushed deceased up against the door (a27) and then petitioner turned and ran (a27). Petitioner recognized the deceased as one of the men who had robbed Willie Brunner the night before (a30). Petitioner had never seen Exh #1, the knife, before; petitioner was defending himself (a32,a33). Petitioner did not wait around to tell the police (a33); two days after petitioner was arrested, he first told his story to his probation officer (a34); petitioner never went to a police officer to tell his story (a34). When the deceased came at petitioner with the knife, petitioner tried to push the knife into the deceased as far as he could (a36). Petitioner surrendered to the police through the mayor of Detroit because petitioner was afraid (a37).

Petitioner rested (a38); there was no rebuttal from the prosecution (a38).

After deliberating some four and one half days, the jury returned a verdict against petitioner of guilty of manslaughter on November 7, 1974 (T367).

Petitioner was sentenced to a term of ten to fifteen years in prison, and at date hereof, petitioner remains incarcerated in State Prison for Southern Michigan at Jackson, Michigan, Charles Anderson, warden.

Petitioner appealed his conviction as a matter of right in timely manner to the Michigan Court of Appeals. Petitioner's conviction was affirmed by Order of the Michigan Court of Appeals dated May 3, 1976 which Order granted the prosecutor's motion to affirm petitioner's conviction, the Michigan Court of Appeals stating in said Order that 'the

questions sought to be reviewed [were] so unsubstantial as to need no argument or formal submission'. The question on which this Court granted certiorari was not raised to the Michigan Court of of Appeals.

Petitioner, an indigent, having no constitutional right to appointment of counsel for an appeal to the Michigan Supreme Court, a discretionary appeal, proceeded to apply for leave to appeal in the Michigan Supreme Court *in propria persona.* This application was denied by the Michigan Supreme Court by Order dated March 25, 1977. The question before this Court was raised in said application.

Petitioner, *in propria persona,* then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, Southern Division (a5).

Counsel was appointed by the district court for petitioner, the issues were orally argued, cross-motions for relief were filed, and the district judge dismissed the petition for a writ of habeas corpus (a17) and entered judgment (a18).

Petitioner appealed from this judgment to the United States Court of Appeals for the Sixth Circuit. The judgment of the district court was affirmed (a19).

Petitioner filed a Motion for Leave to Proceed in *Forma Pauperis* and a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in this Court on June 7, 1979.

By Order of this Court dated October 1, 1979, said Motion for Leave to Proceed in Forma Pauperis and Petition for Certiorari were granted (a57).

SUMMARY OF ARGUMENT

Every person is at all times, whether he is under arrest or not, whether he is formally charged with commission of crime or not, invested under the Fifth Amendment to the United States Constitution with a right to remain silent and not incriminate himself.

Petitioner during the two week period between the occurrence of the homicide and his being taken into police custody was invested under the Fifth Amendment to the United States Constitution with a right to remain silent and not incriminate himself.

During this two week period, petitioner was under no legal obligation to go to the police and offer a statement exculpating himself or, for that matter, incriminating himself.

Petitioner's pre-arrest silence was not in any manner whatever inconsistent with his trial testimony that he had acted in self-defense in the premises.

It was an infringement of petitioner's right under the Fifth Amendment for the prosecutor on trial to elicit from petitioner on cross-examination that he had remained silent during the pre-arrest period and had not sought out the police to volunteer a statement of self-defense, and for the prosecutor to refer to the fact of silence in his argument to the jury and suggest that petitioner's trial testimony was false and contrived because he had remained silent during the pre-arrest period.

Such infringement deprived petitioner of due process and a fair trial under the 14th Amendment to the United States Constitution because it deprived him of his right not to incriminate himself under the Fifth Amendment to the United States Constitution.

Such infringement was not harmless error beyond a reasonable doubt.

CONCLUSION

Petitioner was deprived of his right under the Fifth Amendment to the United States Constitution against self-incrimination and to due process and a fair trial under the Fourteenth Amendment to the United States Constitution when the prosecutor in his state trial cross-examined petitioner concerning his pre-arrest silence and referring to the subject in his argument to the jury.

A writ of habeas corpus must issue to free petitioner from his incarceration in violation of the federal constitution.

ARGUMENT

A defendant in a state criminal prosecution cannot, consistent with the Fifth Amendment to the United States Constitution, be cross-examined concerning his failure to go to the police at a time before his arrest and give the same explanation of self-defense which he gave in testimony on trial.

Petitioner, on cross-examination by the prosecutor, had repeated that he had acted in self-defense when he stabbed the deceased (a33).

The prosecutor then asked petitioner the following questions:

Q [By prosecutor]: And I suppose you waited for the Police to tell them what happened?

A No, I didn't.

Q You didn't?

A No.

Q I see. And how long was it after this day that you were arrested, or that you were taken into custody? (a33)

After some wrangling, a date was established; it appeared that a period of two weeks elapsed from the date of the homicide and petitioner's being taken into custody (a34).

Then the prosecutor asked petitioner the following questions:

Q [By prosecutor] (Interposing) When was the first time that you reported the things that you have told us in Court today to anybody?

A Two days after it happened.

Q And who did you report it to?

A To my probation officer.

Q Well, apart from him.

A No one.

Q Who?

A No one but my —

Q (Interposing) Did you ever go to a Police Officer or to anyone else?

A No, I didn't.

Q As a matter of fact, it was two weeks later, wasn't it?

A Yes. (a34)

On re-direct examination, petitioner testified that his arrest came about as follows: Petitioner turned himself in to the Mayor of Detroit, and petitioner and the Mayor and the Mayor's bodyguard went before a judge of the Recorder's Court for the City of Detroit (a37).

On re-cross examination, the prosecutor asked petitioner the following questions:

Q [By prosecutor]: Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

A Yes, it is. (a37).

Q What is the reason?

A Because I was afraid. Judge Gardner just had gave me probation.

Q You were afraid of whom?

A I was afraid what I had happened.

Q But you hadn't done anything. You were just defending yourself.

A But, I don't know anything about the law. (a38)

Petitioner's trial counsel did not object to any of the above questions on the basis of a violation of petitioner's right under the 5th Amendment to the United States Constitution, nor did trial counsel move for a mistrial.

In his opening summation to the jury, the prosecutor argued as follows:

'Now he [petitioner] waited two weeks, according to the testimony — at least two weeks before he did anything about surrendering himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the Mayor, because he claimed he was afraid. Of course he wasn't afraid during the two weeks, but after two weeks, he decided he was going to be afraid and he was going to surrender himself to the Mayor. I don't know what he really was afraid about. But he didn't make that very clear. He was afraid because of something that he had done. And, it might be something that might militate against his own interest. I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those witnesses.' (a43)

* * *

'I suggest that he surrendered himself after he had those two Witnesses to line up all of those Witnesses that you heard testify.' (a43)

Petitioner's trial counsel argued in response to the prosecutor as follows:

'Now the Defense presented some witnesses in this case whom, by investigation, we came up with. Now I don't want to fault the Police Officers. We had the Police Officers on the stand. He stated, yes, he went out in the area and sought to get statements. But he was unable to do so because the people were uncooperative. I think it is unfortunate that this type of uncooperation is given to the Police Department. But it is a fact, and in our office, we have an investigative staff which are very able to relate to the people of the community. Maybe, a little bit better. And they seek to bring in — Now, we sought to bring in other people besides the people that 'the Prosecution brought in. And that was to get all of the facts about this case.' (a48).

In his rebuttal argument, the prosecutor made the following statements:

'Yes, I agree with counsel that it is bad that people are uncooperative with the Police, that they don't tell the Police things that they saw. And, if there were Witnesses there, why did they not give the Police their names and tell what they saw?

'Well, you will note that every Witness that the Defense did present allegedly as a person who saw what happened, neither waited for the Police to come, or went to the Police. They never came out of the woodwork until the trial today, as far as we know. Why? Why, if they were simply people disinterestedly telling what they saw? Why did they not go to the Police or wait for the Police to come and tell them what they saw the way Mr. Gaines did? The way his aunt did?

* * *

'But, as far as these Witnesses that were presented to you, how did the Defense know what they were? They never gave their names to anybody. You remember what

> I told you in my opening argument? Because I suggested to you that the Defendant had been in contact with them for two weeks before he surrendered, and discussing with them the possibility that they had seen things in a certain way. And then he surrendered. And these Witnesses are presented to you as being people who are testifying to you as to what they really saw! (a54-55)

There were no objections to the above remarks of the prosecutor by petitioner's trial counsel on the basis of petitioner's Fifth Amendment rights, and no motion for a mistrial was made.

It might appear that petitioner's claim herein is barred by the rules promulgated in *Francis v. Henderson,* 425 U.S. 536 (1976) and *Wainwright v. Sykes,* 433 U.S. 72 (1977).

However, two facts militate against this position. First, the Michigan Supreme Court did not reject petitioner's claim on the basis that the question was not preserved by timely objections at trial; the Michigan Supreme Court denied petitioner's application for leave to appeal on the basis that the Court was not persuaded that the Court should review the questions presented, and neither the United States District Court nor the Court of Appeals for the Sixth Circuit rejected petitioner's claim on the basis that the state contemporaneous objection rule was not observed. Cf *Bradford v. Stone,* 594 F.2d 1294, 1296 [foot note 2] (CA9 1979)

Second, that although as a general rule it is necessary for the preservation of a question for appellate review that a timely objection or mortion be made in the trial court under the rules of appellate procedure in the State of Michigan, still the appellate courts of Michigan may in the interests of justice recognize plain error where such error affects substantial rights of the defendant. *People v. Holmes,* 292 Mich. 212 (1940); *People v. Dorrikas,* 354 Mich. 303 (1958); *People v. Mahley,* 390 Mich. 57 (1973).

It has been held that if state rules of appellate procedure allow the state to consider plain error in the absence of preserving objections at trial, the same plain error may be considered by a federal court in a habeas corpus proceeding and is not barred by *Wainwright v. Sykes, supra. Miller v. State of North Carolina,* 583 F.2d 701 (CA4 1978).

o o o

Petitioner had a right under the *Fifth Amendment to the United States Constitution* not to 'be compelled in any criminal case to be a witness against himself'. Through the operation of the *Fourteenth Amendment to the United States Constitution,* the state courts of Michigan could not infringe upon this right of petitioner. *Malloy v. Hogan,* 378 U.S. 1 (1964).

It is petitioner's position that when the prosecutor in his state trial brought out in cross-examination of petitioner that petitioner while at liberty during the period between the occurence of the homicide and his arrest did not seek out the police or any other authority to give his explanation that he had acted in self-defense in the homicide and that when the prosecutor adverted to this point in his argument to the jury, petitioner was deprived of his said Fifth Amendment right.

o o o

The privilege against self-incrimination embodied in the Fifth Amendment does not operate solely to bar compelled testimony of a defendant on the trial where he is the accused. This was made clear by the Court in *Kastigar v. United States,* 406 U.S. 441, 444-445 (1972):

> 'The privilege [against self-incrimination] reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or

adjudicatory; and it protects against all disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.' [Footnotes omitted.]

The breadth of the privilege was defined by the Court in *Malloy v. Hogan, supra:*

'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' 378 U.S. at 8.

The breath of the privilege was also delineated by the Court in *Counselman v. Hitchcock,* 142 U.S. 547, 573-574 (1892) where the Court quotes with approval from Emery's Case, 107 Mass. 172 (1971):

'"By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation against himself, within the meaning of the constitutional provision."'

And the Court in *Ullman v. United States,* 350 U.S. 422, 426 (1956) said that the privilege against self-incrimination of the Fifth Amendment 'must not be interpreted in a hostile or niggardly spirit'.

Thus, it should be clear that if the state cannot compel a defendant upon his trial to be a witness against himself and cannot summon a person before a grand jury or any adjudicatory or investigatory body and compel him to give evidence against himself and cannot compel a person to answer questions of investigating police officers, then *a fortiori* it must follow that the state cannot establish a rule of criminal procedure and evidence which requires a person to seek out the police or the state authorities and give to them exculpatory explanations which nonetheless contain incriminating material concerning an event which might be the basis of a criminal prosecution on pain that the person will be impeached on his trial for remaining silent instead when he undertakes to make the exculpatory explanation from the witness stand.

The state cannot establish such rule because it would either deprive the person of his Fifth Amendment right not to incriminate himself or it would penalize him for exercising his right not to incriminate himself. '[L]egislation cannot abridge a constitutional privilege', *Counselman v. Hitchock, supra,* 142 U.S. at 580; and an accused cannot be forced to choose between two constitutional rights as to which he will invoke on pain of being deprived of his right to invoke the other, *Jones v. United States,* 362 U.S. 309 (1960); *Simmons v. United States,* 390 U.S. 377 (1968).

Thus, if a person can be impeached upon his trial for crime with his pre-arrest silence when he undertakes to give an exculpatory explanation from the witness stand, then such person is placed in the position of choosing between the

exercise of his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to present evidence on his trial to meet the charge against him.

In the case at bar, had petitioner sought out the police or the authorities and given to them the same exculpatory version of events as he gave on trial, petitioner would have incriminated himself at least to the extent of admitting that he was present at the scene of the homicide and that he inflicted the stab wound which was the cause of the deceased's demise. That petitioner was the person who inflicted the stab wound and that petitioner did in fact inflict the stab wound which caused the death of the deceased were elements of the crime of murder in the State of Michigan. *People v. Morrin,* 31 Mich. App. 301, 310-311 (1971); *People v. MacPherson,* 323 Mich. 438, 452 (1949).

This was sufficient for petitioner's invoking his right under the Fifth Amendment not to incriminate himself by not seeking out police or authorities and giving them his exculpatory version of events. Petitioner did not have to assume that the police had witnesses who would place him at the scene of the crime or who would establish that he stabbed the deceased. An accused has the right to hear the entire case of the prosecution before he decides whether he will testify in his own behalf. *Brooks v. Tennessee,* 406 U.S. 605 (1972).

And a person has the right to withhold admitting even one fact which might aid the prosecution in obtaining his conviction. This was made clear by the Court in *Counselman v. Hitchcock, supra,* where the Court quoted with approval Chief Justice Marshall in Burr's trial:

> 'According to their statement, [the counsel for the United States] a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact, of itself, might be unavailing but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thense, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed or is attainable against any individual the court can never know. It would seem, then, that the court ought never to compell a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.' [Material in parenthesis by the Court.] 142 U.S. at 566.

Thus, in the case at bar, petitioner had an altercation with the deceased and acting in self-defense against an attack by the deceased upon him, petitioner stabbed and killed the deceased. Petitioner could not know whether the police had witnesses who could identify petitioner as the person who had stabbed the deceased. If petitioner had gone to the police with his exculpatory version of events, he might have supplied the only evidence the police had available as to the identity of the person who had stabbed the deceased, and having identified himself as that person, petitioner then would have the burden of proving that he had acted in self-defense.

This dilemmatic situation was recognized by Griswold in *The 5th Amendment Today* (Harvard University Press 1955) at page 9 where he stated that the 5th Amendment protected the innocent:

> '[A]nother purpose of the Fifth Amendment is to protect the innocent. But how can a man claim the privilege if he is innocent? How can a man fear he will incriminate himself if he knows he has committed no crime? This may happen in several ways. A simple illustration will show the possibility.
>
> 'Consider, for example, the case of the man who has killed another in self-defense, or by accident, without design or fault. He has committed no crime, yet his answer to the question whether he killed the man may well incriminate him. At the very least it will in effect shift the burden of proof to him so that he will have to prove his own innocence. Indeed, the privilege against self-incrimination may well be thought of as a companion to our established rule that a man is innocent until he has been proved guilty.'

That the privilege against self-incrimination and the presumption of innocence are related is a thought which deserves careful consideration.

It cannot be that the presumption of innocence springs into being only when a person is put on trial on a criminal charge. The presumption of innocence invests every member of society whether he is charged with crime or not. The principle of the presumption of innocence is one of the oldest known to the legal systems of mankind as was shown by the Court *in Coffin v. United States,* 156 U.S. 432, 453-460 (1895), and the most accurate statement of it was that quoted by the Court from Greenleaf On Evidence:

> 'Greenleaf thus states the doctrine: "As men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. . ." On Evidence, pt. 1, §34.'

To state that persons who are charged with crime are presumed to be innocent but persons not charged, not, is to prove the untenability of the proposition.

All persons not convicted of crime are presumed to be innocent of the commission of crime, and since under the decisions of this Court it is clear that 'the accusatorial system has become a fundamental part of the fabric of our society', *Malloy v. Hogan, supra,* 378 U.S. at 10, it must follow that all persons, even those not charged with crime, have the right to remain silent and not incriminate themselves in the face of any accusation or set of suspicious circumstances, and instead have the right to have the state prove each and every fact necessary to constitute the charge against them beyond a reasonable doubt without any help from the accused, *In re Winship,* 397 U.S. 358 (1970).

The same principle was put more forcefully by the Court in *People v. Bigge,* 288 Mich. 417, 420 (1939):

> 'The time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt. There can be no such thing as confession of guilt by silence in or out of court.'

Thus, it can be seen that petitioner while at liberty between the time of the occurence of the homicide and his being taken into custody had the benefit of the presumption of innocence and the right not to incriminate himself.

It was fundamentally unfair of the State on trial to suggest to the jury that petitioner was guilty of the crime charged because he had exercised his right to remain silent and not incriminate himself and to stand on his presumption of innocence and demand that the State as accuser prove its accusation with no help from the petitioner.

The 6th Circuit Court of Appeals ruled in the case at bar

that since 'the petitioner was not questioned concerning his silence while under arrest or otherwise in custody', the principle of *Doyle v. Ohio,* 426 U.S. 610 (1976) did not apply, the Court relying on its opinion in *Bradley v. Jago,* 594 F.2d 1100 (CA6 1979). In that case, a habeas corpus proceeding where the defendant had testified on trial that he had stabbed the deceased in self-defense, the defendant 'didn't stay and explain to the police' and he didn't offer an exculpatory explanation to the police officer who answered his telephone call of inquiry as to the condition of the victim, as the prosecutor was at pains to elicit from the defendant. The Court commented on *Doyle v. Ohio, supra,* as follows:

> 'We do not read *Doyle* to prohibit an attempt to impeach a defendant by cross-examination concerning his failure to offer an exculpatory explanation when the opportunity to do so came before he was in custody and before he had received any advice of his right to remain silent.
>
> * * *
>
> '*Doyle* applies to those situations in which a defendant is entitled to rely on the implicit assurance of the *Miranda* warnings that silence carries no penalty. (Citation omitted.) In contrast, where a defendant has not received warnings, there is nothing unfair in permitting jurors to hear that a defendant initially failed to offer his exculpating version of events after they have heard his version at trial. *It is not to be presumed that failure to explain at that time resulted from an exercise of the Fifth Amendment right to remain silent.*' [Emphasis added.]

Of course, the Sixth Circuit Court was in a sense perfectly correct in its interpretation of *Doyle*: the facts were that the defendant in that case had been arrested and he had been given his *Miranda* warnings and in the face of them, he had remained silent, and this Court said in *Doyle*:

> 'Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. (Citation omitted.) Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.
>
> * * *
>
> 'We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.' 426 U.S. at 617-618, 619.

But the point surely is that the Court in *Miranda v. Arizona,* 384 U.S. 436 (1966) did not create any new constitutional rights nor invest existing ones with attributes not inhering in them when the Constitution was adopted. 'Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.' *Ullmann v. United States,* 350 U.S. 422, 428 (1956).

This Court in *Miranda* explicitly stated that '[w]e start here, as we did in *Escobedo,* with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings', and the Court was careful to delineate that its purpose was to treat with situations where these rights 'were put in jeopardy' 'through official overbearing', 384 U.S. at 442, and 'to insure that what was proclaimed in the Constitution had not become but a "form of words" (citation

omitted) in the hands of government officials'.

The Court in *Miranda* was primarily concerned with the Fifth Amendment right against self-incrimination and the Sixth Amendment right to assistance of counsel, and the only fair inference from the Court's opinion is that every person who is taken into police custody at the time he is taken into police custody is cloaked with the Fifth Amendment right not to incriminate himself and with the Sixth Amendment right to assistance of counsel. The Court's purpose in *Miranda* was to lay down rules of police conduct to insure that an arrested person will not be shorn of these two rights by overbearing police conduct. The Court ruled that before a police officer can properly interrogate a person under custodial conditions, he must state to that person that he does have the right to remain silent and not incriminate himself and that he does have the right to the assistance of counsel.

The point is that the police officer does not create these two rights for the person in custody nor does the police officer with his statement invest the person in custody with any rights which he didn't have before he was taken into custody. *Miranda* merely requires the interrogating police officer to advise the person in custody of those rights with which the Constitution invested him even before he was taken into custody so that the arrested person can exercise these rights or waive them in an act of informed and unfettered and uncoerced choice.

To suggest that a person under arrest has a constitutional right to remain silent and not incriminate himself and a constitutional right to assistance of counsel but that a person not under arrest does not have these two constitutional rights is to suggest that a person who is under arrest has greater and more numerous constitutional rights than a person not under arrest, a suggestion that teeters on the verge of absurdity. If this be so, we are all better advised to get ourselves arrested

for we shall obtain greater rights for our better security against state action.

To state that there is an implicit assurance in *Miranda* warnings that the exercise by a person of his Fifth Amendment right to remain silent will carry no penalty does not establish the reverse of the proposition, namely, that the exercise by a person of his Fifth Amendment right to remain silent in the absence of the giving of *Miranda* warnings will carry penalty. Surely a person taken into police custody who is fully cognizant of all of his constitutional rights has the right to remain silent in the exercise of his Fifth Amendment right while he is in police custody whether any police officer advises him of that right or not and whether any police officer interrogates him or not. And a person may so exercise this right without fear of penalty. To tie the condition of no penalty for the exercise of the Fifth Amendment right to silence to the delivery of *Miranda* warnings by a police officer is to contradict precedents of this Court.

Thus, in *Grunewald v. United States,* 353 U.S. 391 (1957), Halperin was not advised, from what appears in the opinion of the case, by a police officer or by the grand jury, that he had a right to remain silent in the face of the grand jury questions. Yet, he claimed his privilege under the Fifth Amendment and the Court ruled that it was error on trial for the government to impeach him with his silence before the grand jury when he undertook to give exculpatory answers to questions similar to those asked of him by the grand jury from the witness stand.

And several courts have held that there can be no different consequences following from an arrestee's silence exercised before *Miranda* warnings were given to him than following silence exercised after *Miranda* warnings were given. Thus, in *United States v. Impson,* 531 F.2d 274, 277-278 (CA5 1976), the Court said:

'Government counsel also points out that the silence in question in *Hale* [United States v. Hale, 422 U.S. 171 (1975)] was after the defendant had received *Miranda* warnings, while that of Impson occurred prior to any such warnings. Once more, we find the argument advanced unpersuasive. The contention is that practically *Miranda* warnings tend to inhibit speech and that silence after such warnings is less inconsistent with innocence than silence in the absence of such warnings. This argument conflicts with the whole purpose and policy of *Miranda* by rewarding the police for failure to inform an accused person promptly upon his arrest of his right to remain silent. Silence is the right of the innocent as well as of the guilty, (citation omitted). In the face of the numerous legitimate reasons for an arrested person to elect to remain silent we decline to attempt an enumeration of instances in which silence by an arrested person may be of probative value to the government's case. We discern no merit in the appellee's argument that silence in the absence of *Miranda* warnings raises a greater inference of guilt than silence following such warnings.'

And in *United States v. Henderson*, 565 F.2d 900, 905 (CA5 1978), the Court said:

'The silence of an accused who has not been given a *Miranda* warning cannot be used against him to impeach his credibility, unless his silence is inconsistent with his innocence and inconsistent with his exculpatory statement given at trial. Otherwise, it lacks significant probative value and carries with it an intolerable prejudicial impact.'

See also: *Bradford v. Stone*, 594 F.2d 1294 (CA9 1979); *United States ex rel Allen v. Rowe*, 591 F.2d 391 (CA7 1979); *People v. Antoine*, 415 N.Y.S.2d 77 (1979); *State v. Rios*, 592 P.2d 1299 (Ariz. 1979).

If indeed the Constitution in the Fifth Amendment confers on every person the right to remain silent in the face of

accusation, if the Fifth Amendment confers on every person the right not to incriminate himself, then it is always dangerous for a court to examine into the question whether his silence was inconsistent with innocence because such examination undermines the Fifth Amendment guarantee itself by converting it from a shield into a sword of condemnation. If a person's exercise of his constitutional right to silence can be construed by a court as being inconsistent with innocence, then a person before he exercises his constitutional right to silence must first decide whether a court might construe his silence as being inconsistent with innocence and such person might be placed in a dilemmatic position in which he damns himself by speaking and he damns himself by remaining silent. Of what value can the protection of the Fifth Amendment against self-incrimination be if it can be pulled away from a person by a court's ruling that its invocation by the person is inconsistent with his innocence.

Most usually when a person invokes his Fifth Amendment right to remain silent, it is in a non-judicial setting, the person being in custody or not, in circumstances where all of the evidence against him on a particular charge or suspicion has not been marshalled. However, when a defendant on his trial elects to invoke his Fifth Amendment right to remain silent and not take the witness stand, all of the evidence against him has, presumably, been marshalled and presented to the court and jury. It would seem to be more logical for a court to rule in most cases that the accused's silence in the latter circumstances was inconsistent with innocence than in the former and to throw the principle of *Griffin v. California*, 380 U.S. 609 (1965) out of the window and allow the prosecutor to make whatever comments he wished on the accused's failure to testify.

However, the rationale of *Griffin v. California* seems to

be that no matter how overwhelming the evidence against the accused might be, no matter how loudly the evidence calls for reply or explanation from the accused, no matter how inconsistent with innocence the accused's refusal to testify might appear, still he has an absolute right under the Fifth Amendment to remain silent and it is impermissible for court or prosecution to damn the accused for exercising that right by making comment to the jury about it.

And the same policy should be adopted by the Court regarding the exercise by a person of his Fifth Amendment right to silence made under any circumstances.

The words of the Court in *People v. Bobo,* 390 Mich. 355, 360, 361 (1973) can be read with profit on this point:

> 'Whether his [defendant's] silence was prior to or at the time of arrest makes little difference - the defendant's Fifth Amendment right to remain silent is constant.
>
> * * *
>
> 'If silence in the face of specific accusation 'may not be used [against a defendant], it would be a strange doctrine indeed that would permit silence absent such an accusation to be used as evidence of guilt.'

Consideration of the analagous situation involving a person's Sixth Amendment right to assistance of counsel would be helpful. In *United States ex rel Macon v. Yeager,* 476 F.2d 613 (CA3 1972), the defendant, on the morning after the homicide, and *before his arrest,* called his attorney. The prosecutor on trial in argument to the jury suggested that the defendant's calling his attorney was not the act of an innocent man. The Court found that this suggestion was an impermissible infringement of the defendant's Sixth Amendment right to the assistance of counsel. See also: *Zemina v. Solem,* 573 F.2d 1027 (CA8 1978).

Adoption of a rule that a defendant who testifies at his trial

can be impeached with his silence before arrest can lead to absurb results. Consider a situation where two men are surprised by the police ostensibly in the commission of a crime. The two men break and run but one is immediately captured and the other makes good his escape. The captured man is immediately given his *Miranda* warnings and he remains silent. The other man remains at liberty for two weeks before surrendering to police custody. Under these circumstances, according to the rule laid down in the case at bar by the Sixth Circuit, the captured man can take the witness stand and present a defense to the jury with full confidence that he will not be impeached with his silence at the time of his arrest, while the man who was at liberty for two weeks can take the witness stand in his own defense only at the price of being impeached with his failure to come forward during those two weeks with the same explanation he is to give from the witness stand.

And consider a situation wherein the newspapers reliably report prominently on the front pages that several persons have gone to the prosecutor to complain that a prominent public official had extorted campaign contributions from them in violation of the Hobbs Act. The prosecutor then investigates the allegations for two weeks with his progress reported daily in the newspapers including the uncovery of seemingly incriminating or suspicious facts. The prosecutor recommends the issuance of a warrant of arrest for the public official and it is duly issued. On the day of the issuance of the warrant, the public official is out of town on business and when informed of the issuance of the warrant, states that he will be returning to town in three days and will then surrender to the prosecutor for arraignment. From start to finish, the public official makes no comment whatever and does not ever in any manner make attempt to get in touch with the

prosecutor or the police to 'tell his side of the story'. Can we say that the ends of due process are met if we allow the prosecutor to impeach the public official on his trial with his pre-arrest silence when he takes the stand 'to give his side of the story'?

In such situation, the public official, during the period of investigation and after the warrant had issued and while he was still not arrested, even with the advice and assistance of counsel, and without knowing the exact nature of the accusations made against him and without knowing the nature of the evidence against him, would have to decide whether he would take the stand at his trial if there was to be a trial. If he decided that he would take the stand on trial, he would have to decide precisely what his defense on trial would be, because he certainly would not want to make a pre-arrest exculpatory statement to the prosecutor which would prove to be at variance with what he later said on trial from the witness stand.

It can readily be seen that the public official would be placed in an impossible position. On trial, after the prosecution has presented its case *in toto,* an accused can make an informed decision whether it is, first, necessary for him to testify in refutation of the prosecution's charges, and, second, whether it is advisable for him to waive his Fifth Amendment privilege to remain silent. But during the period prior to arrest, without the accused's knowing the precise substance of the accusations made against him and without knowing whether formal charges will be brought against him, it is impossible for the accused to decide, first, whether it is necessary for him to make a statement refuting the accusations against him, and, second, whether it is advisable for him to waive his Fifth Amendment privilege not to incriminate himself.

Furthermore, if a person heard that the police were looking

for him on a particular charge or that there was a warrant for his arrest on a particular charge and this person wanted to make an explanation to the police of an exculpatory nature and he went to the nearest precinct police station and announced that he understood the police were looking for him on a particular charge and that he wanted to make a statement, would not the police be under obligation to warn that person that he had a right to remain silent?

In *Miranda v. Arizona, supra,* the Court said:

> 'There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' 384 U.S. at 478

Apart from the fact that the above is *dictum,* it can be reasonably argued that serious questions of the voluntariness of a statement made to the police can be raised when it is shown that a warrant for the arrest of an individual has issued and that the law requires a person to seek out the police and inform them of the same facts which he intends to testify to on trial on penalty that his credibility will be attacked on trial for his failure to do so.

The impeachment of petitioner in the case at bar with his pre-arrest silence cannot be justified on the basis that his silence was inconsistent with his exculpatory testimony on trial.

In *United States v. Hale,* 422 U.S. 171, 176 (1975), the Court said:

> 'A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. (Citation omitted.) If the Government

> fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.'

The Court in *Hale* went on to conclude that silence after warnings that the defendant had a right to remain silent was ambiguous and devoid of any probative value.

In *United States v. Harp,* 513 F.2d 786, 790 (CA5 1975), the Court said:

> 'Total inconsistency is the criterion. If any rational explanation for the defendant's invocation of his Fifth Amendment privilege exists, the prosecution's impeachment use of a failure to speak would be error.'

See also: *United States ex rel Allen v. Rowe, supra; United States v. Henderson, supra.*

A rational explanation for petitioner's pre-arrest silence in the case at bar could be that petitioner didn't know that he had an obligation to go to the police and give an exculpatory statement. Because of the intense and universal publicity given to the *Miranda v. Arizona* case in the media in this country, many person have become aware of the fact that they have a right under the Fifth Amendment to remain silent. However, it would be safe to say that very few persons know that they have an obligation to seek out the police and give them an exculpatory statement when they hear of an accusation made against them, if indeed there is such obligation in law. Most person in their misguided folk wisdom would probably say 'If I've got a right to remain silent, how can I have an obligation to speak?'

Thus, there is no basis in the case at bar to say that petitioner's impeachment with his pre-arrest silence was proper because such silence was inconsistent with his exculpatory testimony on trial.

Nor can it be said that the error here complained of was

harmless under the doctrine of *Chapman v. California,* 386 U.S. 18 (1967).

Not only did the prosecutor pointedly and forcefully elicit from petitioner the fact that he had exercised his right to silence before he was arrested, and not only did the prosecutor advert to this fact in his argument to the jury, but the prosecutor engaged in a systematic exploitation of the theme that all defense witnesses were lying in their testimony on trial - the petitioner and the witnesses whom he called - because neither the petitioner nor his witnesses went to the police with their stories at any time before trial.

Thus, of Fontaine Berrien, a witness called by petitioner, who testified to having seen the struggle between petitioner and the deceased, the prosecutor asked the following questions on cross-examination:

Q [By prosecutor] Were you there when the Police came?

A No.

Q Oh, you weren't?

A No.

Q And you never gave the Police your name or anything?

A No.

Q You never went to the Police Station and told them what you saw?

A No. (T251)

Q You never stopped a Scout Car and told them what you saw?

A No.

Q Uh-huh. (T252)

Of the witness Adolphus Cunningham, also called by the petitioner, who testified that he had seen the struggle between the petitioner and the deceased, the prosecutor asked the

following questions on cross-examination:

Q [By prosecutor]: This information, which you saw?

A Yes.

Q How long was this after you went to the Police that day and told them what you saw?

A I didn't go to the Police.

Q You didn't go to the Police?

A I didn't go to the Police. (T271)

This was improper cross-examination by the prosecutor for no inference can be drawn from the fact that a witness did not go to the police. *United States v. Young,* 463 F.2d 934, 938 (CADC 1972).

Thus, it can be seen that the prosecutor's strategy was quite broad: impeach the testimony of petitioner with his pre-arrest silence and impeach petitioner's witnesses with their pre-trial silence and then argue to the jury not only the unreliability of the testimony of the petitioner and of his witnesses because of their silences, but allege that they conspired to conjure false testimony.

The question is what was the probable effect of the prosecutor's tactics on the jury's verdict. In the case at bar, the key issue was whether petitioner had acted in self-defense. Petitioner's credibility was all-important.

In a similar context, where the defendant had claimed in his testimony on trial that he had acted in self-defense and the prosecutor had argued to the jury that if this were so, defendant would have said so when he spoke to the police, the Court, in granting habeas corpus, said:

> 'Thus, we cannot say beyond a reasonable doubt that, absent the prosecutor's improper reference to Reid's earlier silence, the jury would have rejected Reid's version of the facts. The case turned entirely on credibility, and the Commonwealth's Attorney used an unconstitutional means to attempt to discredit the defendant's testimony. Accordingly, the error cannot be considered harmless.'

Reid v. Riddle, 550 F.2d 1003, 1004 (CA4 1977).

In *Chapman v. United States,* 547 F.2d 1240, 1249-1250 (CA5 1977), the Court laid down the following criteria to judge the harmlessness *vel non* of improper impeachment with silence:

> 'When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous. (Citations omitted.)
>
> 'When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, *i.e.,* when the prosecutor elicits that fact on direct examination and refrains from commenting on it, or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming. (Citation omitted.)
>
> 'When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.'

Petitioner's case herein instantiates the first rule above.

The evidence against petitioner was not overwhelming. At least the jury apparently didn't think so: they took four and a half days to return a verdict of manslaughter where the charge in the case was murder of the first degree. The prosecutor deliberately elicited the fact of petitioner's pre-

arrest silence on cross-examination and linked it in argument to the jury not only to the implausibility of petitioner's exculpatory testimony but to subornation of perjury of his witnesses. And petitioner's version of events was not frivolous in the least.

The prosecutor's forceful, extensive and repeated references to pre-trial silence by petitioner and his witnesses as evidence of the untruthfulness of their testimony on trial 'carried with it an intolerable prejudicial impact'. *United States v. hale, supra,* 422 U.S. at 180; *United States v. Impson, supra,* 531 F.2d at 279.

RELIEF SOUGHT

This Court should reverse the Order of the United States Circuit Court of Appeals for the Sixth Circuit and remand the case to the United States District Court for the Eastern District of Michigan, Southern Division, with instructions to grant petitioner's petition for a writ of habeas corpus conditioned upon the State of Michigan granting petitioner a new trial.

Respectfully submitted,

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